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No. 94-317

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORAI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM

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13pp

TABLE OF CONTENTS

PAGE

ARGUMENT 3
CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Amoco Production Co. v. Gambell,
480 U.S. 531 (1987) 4
Bob Jones University v. Simon,
416 U.S. 725 (1974) 6
Califano v. Yamasaki,
442 U.S. 682 (1979) 4
California v. Grace Brethren Church,
457 U.S. 393 (1982) 7
McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) 6
Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't.,
446 F.2d (5th Cir. 1971) 3
National Trust For Historic Preservation v. FDIC,
995 F.2d 2
National Trust For Historic Preservation v. Federal Deposit Insurance Corp.,
21 F.3d 469 (D.C. Cir. 1994) 2
National Trust For Historic Preservation v. U.S. Army Corps of Engineers,
552 F. Supp. 784 (S.D. Ohio 1982) 9

North Oakland Voters Alliance v. City of Oakland,
1992 WL 367096 (N.D. Cal., No. C-92-0743
MHP, Oct. 6, 1992) 3
*Sierra Club, Lone Star Chapter v. Federal Deposit
Insurance Corp.*,
992 F.2d (5th Cir. 1993) 3, 4, 5, 6
South Carolina v. Regan,
465 U.S. 367 (1984) 5
Ward v. RTC,
996 F.2d 99 (5th Cir. 1993) 5

STATUTES

12 U.S.C. § 1821(j) 1, 3, 6
12 U.S.C. § 1821a(a)(4) 4
12 U.S.C. § 1823(d)(3)(A) 4
16 U.S.C. § 470f 2
16 U.S.C. § 470h-2(a) 2
16 U.S.C. § 470h-2(a)(2) 8
16 U.S.C. § 470i(a)(2) 8
16 U.S.C. § 470i(a)(4) 8
16 U.S.C. § 470i(a)(8) 8
16 U.S.C. § 470w-4 9
36 C.F.R. § 800.1(b) 8
36 C.F.R. § 800.3(a) 9
36 C.F.R. § 800.3(b) 8
36 C.F.R. § 800.13 8
36 C.F.R. § 800.15 8

MISCELLANEOUS

H. Rep. No. 96-1457, reprinted at 1980
U.S.C.C.A.N. 6378, 6400 . . . . . 7, 8

No. 94-317

IN THE
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NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC.; AND PRESERVATION TEXAS, INC.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
In its Corporate Capacity as an Instrumentality
of the United States,

Respondent.

REPLY MEMORANDUM

As each party recognizes, this case presents the important and unsettled question of whether Congress intended, when it enacted 12 U.S.C. § 1821(j),[1/] to immunize the Federal Deposit Insurance Corporation ("FDIC") from judicial restraint to prevent actions alleged to violate federal law, where no alternative remedy is available,

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[1/] Section 1821(j) provides that "[e]xcept as provided in this section, no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

and where a denial of equitable relief would completely preclude judicial review of the FDIC's actions. Petitioners' claim is based on the FDIC's violation of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470f, 470h-2(a), which can only be remedied by equitable relief. The FDIC sold a historic building to a developer intent on razing it and authorized its demolition, without prior compliance with the requirements of the NHPA, and has persuaded the District of Columbia Circuit that the FDIC's actions and, indeed, any future actions that the FDIC may take in violation of the NHPA, should be insulated from judicial restraint.

Under the reasoning of the District of Columbia Circuit in this case, federal courts would not only be powerless to forestall the FDIC's unlawful destruction of historic or natural resources, but would also be prohibited from restraining any unlawful or criminal conduct by the FDIC, even if such conduct creates irreparable consequences for public health and safety, such as "operat[ing] a factory or even a hazardous waste facility" in violation of federal regulations. *National Trust For Historic Preservation v. Federal Deposit Insurance Corp.*, 21 F.3d 469, 471 (D.C. Cir. 1994) (Wald, J. concurring and quoting from prior dissenting opinion). This draconian result is untenable, given the "thundering silence on the part of Congress"[2/] concerning any intent to preclude judicial review in cases like this where no alternative remedy is available.

[2/] *National Trust for Historic Preservation v. FDIC*, 995 F.2d at 243 (Wald, J., dissenting).

ARGUMENT

1. The FDIC acknowledges that the District of Columbia Circuit's decision conflicts with the decision of the Fifth Circuit in *Sierra Club, Lone Star Chapter v. Federal Deposit Insurance Corp.*, 992 F.2d 545 (5th Cir. 1993), but argues that the cases are distinguishable. None of the FDIC's distinctions withstand scrutiny, however, and the conflict among the circuits remains unresolved.[3/]

[3/] While the FDIC acknowledges that its sale of the Dr. Pepper Headquarters Building to Dal-Mac Investment Corporation has not rendered the issues in this petition moot, the FDIC suggests that it "is . . . no longer in a position to comply with any prior consideration and consultation requirements that the NHPA might impose with respect to that sale." Opp. at 7. This statement is incorrect. If the Supreme Court were to conclude that § 1821(j) does not prevent the court from redressing the FDIC's violation of the NHPA, petitioners have already notified the District of Columbia Circuit and the FDIC that they would seek to have the sale of the Dr. Pepper Headquarters Building rescinded, and then require compliance with the NHPA. *Cf. Sierra Club*, 992 F.2d at 548 (acknowledging authority to rescind sale for noncompliance with the National Environmental Policy Act).

Furthermore, where a federal agency has violated environmental and preservation laws, those acting in concert with the agency can be subject to suit because otherwise subversion and circumvention of federal law would be sanctioned. *See, e.g., Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't.*, 446 F.2d 1013, 1027 (5th Cir. 1971). *See also North Oakland Voters Alliance v. City of Oakland*, 1992 WL 367096 (N.D. Cal., No. C-92-0743 MHP, Oct. 6, 1992) (City of Oakland could be sued for a violation of § 106 of the NHPA by the Department of Housing & Community Development). In that regard, on March 15, 1993, the FDIC authorized Dal-Mac, through a power of attorney, to apply for

(continued...)

According to the FDIC, *Sierra Club* merely involved "the FDIC's decision to consent to the sale of an asset held by a private party," while the instant case involves the "actual sale of an asset held by the FDIC itself." Opp. at 10-11. This distinction is insignificant, however, because in both cases the FDIC was acting in its "corporate capacity," 992 F.2d at 549, and that was the important factor in the Fifth Circuit's analysis.[4/]

The FDIC also attempts to distinguish *Sierra Club* on the ground that the FDIC in that case was acting pursuant to its authority under 12 U.S.C. § 1821a(a)(4), rather than 12 U.S.C. § 1823(d)(3)(A), which applies here. The FDIC suggests that the Fifth Circuit might interpret § 1823(d)(3)(A) differently from § 1821a(a)(4) in a future case. Opp. at 10-11. However, the Fifth Circuit in *Sierra Club* addressed *both* § 1823(d)(3)(A) and § 1821a(a)(4), emphasizing their "similar[ities]," and held that *neither* provision "clearly and unambiguously" divests the federal courts of equity jurisdiction, which is the showing required by this Court. *Sierra Club, Lone Star Chapter*, 992 F.2d at 548-50 (citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)).

[3/](...continued)
a demolition permit for the historic building. Thus, Dal-Mac became the agent of the FDIC at a time when the FDIC had been notified that such an action violated the NHPA.

[4/] "The statutory duties imposed on the FDIC in its corporate capacity . . . generally do not involve the same urgency as when the FDIC acts as a receiver." *Sierra Club, Lone Star Chapter*, 992 F.2d at 550.

Nor does the Fifth Circuit's decision in *Ward v. RTC*, 996 F.2d 99 (5th Cir. 1993), support the FDIC's argument that a conflict exists within the Fifth Circuit, or that the Fifth Circuit has changed its view on this issue. Opp. at 11. Indeed, in *Ward*, the Fifth Circuit explicitly stated that its decision was "consistent" with the decision in *Sierra Club* because *Ward* involved the activities of the RTC as conservator or receiver, while in *Sierra Club* the FDIC was acting in its corporate capacity. 996 F.2d at 104 n.2.[5/] More importantly, the Fifth Circuit specifically distinguished *Ward* from the instant case -- and from *South Carolina v. Regan*, 465 U.S. 367 (1984) -- on the grounds that the plaintiff in *Ward* had an alternative remedy, in the form of an administrative procedure for claiming monetary damages, while the National Trust plaintiffs have no alternative remedy. 996 F.2d at 104.

2. In response to the National Trust's argument that the Circuit's decision is in conflict with decisions of the Supreme Court, the FDIC argues that the Circuit analyzed the legislative history of the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA"), as dictated by *South Carolina v. Regan*, but that the legislative history offered "no evidence" of Congressional intent to provide an

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[5/] Although the Fifth Circuit in *Ward* cited the District of Columbia Circuit's first opinion in the *National Trust* case (at 996 F.2d at 102 n.8, 104), the Fifth Circuit inaccurately assumed that the FDIC in the *National Trust* case was exercising the functions of a receiver, *id.* at 104, when in fact the FDIC was acting in its corporate capacity, as in *Sierra Club*.

alternative remedy for "any and all malfeasance." Opp. at 12.[9]

Instead of applying this Court's strong presumption against the deprivation of judicial review, however, the District of Columbia Circuit essentially flipped the standard on its head in relying on a conclusion that the legislative history of FIRREA provided suggestion of an intent to alleviate the literal bar of § 1821(j) when a plaintiff was left without any remedy. Thus, in the face of acknowledged congressional silence, the District of Columbia Circuit applied a presumption in favor of divesting the courts of equitable jurisdiction, while the Fifth Circuit adopted precisely the opposite approach:

> [T]he court's equity jurisdiction provides an essential safeguard to individual rights against arbitrary government action that cannot be indirectly cast aside.

Sierra Club, Lone Star Chapter, 992 F.2d at 550.

Aside from the fact that the Circuit's analysis turned the Supreme Court precedent on its head, the FDIC does nothing to address the direct conflict between the decision below and this Court's decisions in *Bob Jones University v. Simon*, 416 U.S. 725 (1974) (rejecting a due process challenge to the Tax Anti-Injunction Act on the ground that the aggrieved party ultimately had access to judicial review); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)

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[9] As demonstrated in the petition for certiorari, this statement is incorrect. *See* Petition For Cert. at 17-20.

(jurisdiction-limiting provision of immigration law did not prevent the district court from having jurisdiction); and *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (Tax Anti-Injunction Act bars declaratory and injunctive relief against state tax collection unless there is "no 'plain, speedy and efficient remedy'" in state courts).

3. The FDIC does acknowledge that the decision of the Circuit results in a potential clash of federal governmental interests between two federal agencies, itself and the Advisory Council on Historic Preservation. Nevertheless, the FDIC states that the accommodation of those interests must be accomplished through means other than litigation. Opp. at 13-14. On the contrary, Congress has already established the mechanism for reconciling and balancing those interests -- the National Historic Preservation Act itself. Congress recognizes that:

> most Federal agencies have a primary purpose other than historic preservation; however, it is reasonable to expect that they also view themselves as multiple resource managers responding to diverse economic, social and environmental concerns--including the concerns of historic preservation.

H. R. Rep. No. 96-1457 at 37, *reprinted in* 1980 U.S.C.C.A.N. 6378, 6400.

The NHPA accomplishes this balancing function both through the composition of the independent Advisory Council on Historic Preservation and through the Section 106

review process. Because the Advisory Council includes representatives of six federal agencies,[7] 16 U.S.C. § 470i(a)(2), (4), the Council functions as a "balanced forum where representatives of various interests can deliberate on policy questions and reach true 'public interest' decisions on historic preservation matters." H. R. Rep. No. 96-1457 at 40, *reprinted in* 1980 U.S.C.C.A.N. at 6403.[8]

The whole purpose of the Section 106 review process is to "accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest." 36 C.F.R. § 800.1(b). The procedures implementing the NHPA are designed to be extremely "flexible," *id.* § 800.3(b), in order to accommodate agency needs while ensuring that historic preservation goals are not unduly compromised.[9] The Section 106 regulations encourage federal agencies to reach

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[7] Petitioner National Trust for Historic Preservation is also a member of the Advisory Council, 16 U.S.C. § 470i(a)(8), and brought this action partly in that capacity.

[8] "[T]he Council's decisions on preservation questions that come before the Council represent a public interest determination, that assures that historic preservation needs are satisfactorily balanced with other public policy requirements." H. R. Rep. No. 96-1457 at 43, *reprinted in* 1980 U.S.C.C.A.N. at 6406.

[9] For example, the NHPA encourages agencies to develop special compliance procedures that are tailored to the particular needs of agency programs. See 36 C.F.R. §§ 800.13, 800.15 (Programmatic Agreements and Counterpart Regulations); 16 U.S.C. § 470h-2(a)(2).

agreement on alternatives or mitigation measures that "meet both the needs of the undertaking and preservation concerns." *Id.* § 800.3(a).

Contrary to the FDIC's assertion, Opp. at 13-14, Congress also expressed its clear intention that the accommodation of historic preservation interests under the NHPA be resolved by litigation where necessary, since Congress established a specific private right of action to enforce the NHPA. 16 U.S.C. § 470w-4. That cause of action is intended to remedy, among other things, an agency's refusal to comply with the Section 106 review process. *See, e.g., National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784 (S.D. Ohio 1982).

Ultimately, the question of whether there is a potential clash between the historic preservation concerns of the NHPA and the programmatic mission of the FDIC is a question to be resolved by a court on the merits. Yet no court will have the opportunity to resolve that question on the merits if the Circuit's ruling is allowed to stand. Congress intended that agencies not be allowed to act unilaterally to exempt themselves from Section 106, as the FDIC has attempted to do here. The FDIC's effort to insulate itself from judicial review will result in irreparable injury for which no alternative form of relief is available.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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